



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF W-S-S-

DATE: JUNE 6, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a staffing service, seeks to employ the Beneficiary as an instructor. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This EB-2 employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the record did not establish the Petitioner's required ability to pay the proffered wage, and that the job offer to the Beneficiary is not a realistic one.

On appeal, the Petitioner asserts that the Director erred in finding it unable to pay the combined proffered wages of this and other petitions it has filed, and that the job offer is realistic given that the Beneficiary will work in the Petitioner's corporate office and not at a third-party facility.

Upon *de novo* review, we will withdraw the Director's decision and remand this matter for further proceedings consistent with the following opinion.

I. EMPLOYMENT-BASED PETITIONS FOR SCHEDULE A OCCUPATIONS

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate

uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.¹ If USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.* The proffered wage in this case is \$68,328 per year.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. Here, according to the Beneficiary's IRS Form W-2, Wage and Tax Statement, the Petitioner paid the Beneficiary \$5,805.70 in 2017, which is less than the proffered wage.

If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.² Here, the Petitioner's net income in 2017 was greater than the difference between the proffered wage and the wages paid to the Beneficiary.

However, USCIS records show that the Petitioner has filed multiple Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.³

In response to the Director's request for evidence, the Petitioner submitted evidence related to 147 other Form I-140 petitions that were pending or filed after June 26, 2017. In his decision, the Director found that based on the evidence provided for 2017, the Petitioner had not established its ability to pay the proffered wage of this petition and its other relevant Form I-140 petitions. On appeal, the

¹ The priority date of the petition is June 26, 2017, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

² Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 F. App'x 292, 294-295 (5th Cir. 2015).

³ We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage. Further, the Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

Petitioner asserts that the Director erred in finding it unable to pay the combined proffered wages of this and its other petitions.

Here, the Director did not correctly analyze the Petitioner's ability to pay the wages of its other Form I-140 beneficiaries. Specifically, he calculated the Petitioner's total wage deficiency by multiplying the proffered wage in this case (\$68,328) by the number of pending petitions (147). Because neither the Petitioner's net income nor its net current assets exceeded \$10,044,216 in 2017, the Director found that the Petitioner did not have the ability to pay the wages of all of its relevant Form I-140 beneficiaries. However, the Director's calculation is incorrect. For each year at issue, the determination of the Petitioner's ability to pay the wages of beneficiaries of Forms I-140 that were pending or approved as of, or filed after, the priority date of the current petition should be made as follows: (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and the Petitioner's other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.⁴ The Director's calculation used the proffered wage for the current Beneficiary instead of the actual proffered wage for each other beneficiary, and he failed to consider the wages paid by the Petitioner to the other beneficiaries as reflected on their 2017 IRS Forms W-2.

Further, the Director did not analyze the totality of the Petitioner's circumstances in reviewing its ability to pay multiple beneficiaries. We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

On remand, the Director should properly analyze the information provided by the Petitioner regarding its Form I-140 petitions that were pending or approved as of, or filed after, June 26, 2017, and the Director should evaluate the totality of the Petitioner's circumstances.

III. PROFESSIONAL []

Although not addressed by the Director in his decision, the duties of the offered job do not appear to fit within the definition of a "professional []" as described in 20 C.F.R. § 656.5(a)(3)(ii). If the offered position is not a Schedule A occupation, the petition cannot be approved without a DOL-certified labor certification.

The term "professional []" is defined as follows:

Professional [] means a person who applies the art and science of [] which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional [] generally includes making [] judgments involving the observation, care and counsel of persons requiring []

⁴ It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

care; administering of [] and treatments prescribed by the [] and participation in the activities for the promotion of [] and prevention of [] in others. A program of study for professional [] generally includes theory and practice in [] areas such as []
[]

Id.

The title of the offered position is [] instructor, and the job duties are described on the labor certification as follows:

Responsible for the [] education and training programs to meet the learning and developmental needs of the professional [] staff. Conduct the [] education and training programs for professional [] staff. Maintain awareness of advances in [] computerized [] equipment, data processing technology and government regulations. Design, direct, and evaluate strategies to maintain [] competency of the professional [] staff. Prepare applicants for [] exams.

On appeal, the Petitioner emphasized that the Beneficiary will solely be working in its corporate office and not in a [] or other third-party [] facility. Although the job offer at the corporate office appears to be realistic, it does not appear that the Beneficiary will make [] judgments involving the observation, care, and counsel of []. Therefore, the offered position does not appear to meet the definition of professional nurse at 20 C.F.R. § 656.5(a)(3)(ii). On remand, the Director should determine whether the offered position is a Schedule A occupation.

IV. CONCLUSION

The decision of the Director will be withdrawn. The matter is remanded to the Director for proper consideration of the Petitioner's ability to pay. The Director should also determine whether the offered position is a Schedule A occupation. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of W-S-S-[]* ID# 3426262 (AAO June 6, 2019)